Mr Justice Clifford

Supreme Court of the United States.

No. 13, December Term, 1868.

IN ERROR TO THE COURT OF APPEALS, STATE OF KENTUCKY.

Hepburn et al vs. *Griswold*,

ARGUMENT

(AGAINST THE POWER OF CONGRESS TO MAKE UNITED STATES TREASURY NOTES A LEGAL TENDER)

OF

CLARKSON N. POTTER,

of Counsel for Defendant in Error.

NEW YORK:
SAMUEL HAMILTON, BOOK, LAW AND JOB PRINTER,
No 61 Cedar Street, Adjoining Post Office.
1868.

If your Honors please:—

I am glad that the final hearing of this most important cause comes on at a time when the war, and the necessities with which we were for a while borne down, have passed by, and when the questions involved in this case may be considered without fear that what we regard as their just decision can work any public inconvenience. Nay, that it comes on to be heard at a time, as I think, when, whatever may have been the fact heretofore, the credit and prosperity of the nation, and all great public interests, will be served, by a determination of it in accordance with the views of my client, and of the Court below.

Not that I doubt that your Honors will decide this question, and every question, according to your own reasons and consciences. This Department of the Government, as your Honors' predecessors long since declared, "can listen only to the mandate of the Law." But, the reluctance one Department naturally has to declare the acts of another Department illegal, will be justly mitigated when it can be seen that no ill effects,—nay, that public advantage,—may result from such action.

Case stated.

This case presents but the naked question of the power of Congress to make the Treasury Notes of the Government a legal tender at their nominal value in the dis-

charge of a private debt, which was contracted and matured *before* the passage of the Law authorizing the issue of these notes.

(Printed Record pg. 6.)

Principles settled.

Now, whatever differences may exist as regards the true construction of the Constitution, as a lawyer addressing this supreme Tribunal, I cannot but be mindful that certain general rules for its construction have been established here; and that, here at least, it must be treated as settled, that—

First: This Government has no powers whatever except those derived from the Constitution.

Second: By the Constitution, it has all the powers thereby expressly delegated to it.

Third: And also, all those powers which are "necessary and proper" for carrying into execution any of the delegated powers.

Fourth: And "when the end is legitimate, when it is within the scope of the Constitution, all the means which are appropriate, plainly adapted to the end, not prohibited, but consistent with the letter and spirit of the Constitution," are taken to be "necessary and proper," and, therefore, "constitutional."

Fifth: Within the sphere of the authority thus delegated, this Government is supreme.

Bearing in mind these principles, we have now to inquire how far Congress was authorized to make the Treasury notes of the Government a Legal Tender.

Now, that the Constitution has not expressly delegated any authority to Congress to make these Treasury notes adequate to discharge the debts of private individuals, at their nominal value, must be conceded.

Can such a power, then, be implied from the authority "to coin money, and regulate the value thereof?" Or, can it be regarded as one of the measures "necessary and proper" to carry into effect either the power to "borrow money," to "regulate commerce," to "raise and support armies," to "provide and maintain a navy," to "suppress insurrection," to "repel invasion," or any other of the powers delegated to Congress?

FIRST POSITION.—This power is not embraced in the authority given Congress to "coin money."

"Money" as used in the Constitution.

Money is used in the Constitution in two senses. In the 2d sub-division of the section relating to the powers of Congress, the Constitution speaks of the power "to borrow money;" and there the word must be used in the larger sense, of strict money, or of any thing received instead. But in the 5th sub-division of that section, which gives Congress power "to coin money and regulate the value thereof and of foreign coins," it must be evident that Congress referred only to *metallic* money.

From time immemorial, in all countries, in all ages of the world, the precious metals have been the medium of exchanges, and the strict monies. We read that, some four thousand years ago, Abraham purchased the cave of Machpelah with shekels of silver "current money with the merchants."

The value of these metals has been designated by a stamp upon them indicating their fineness and weight; that is, indicating the value at which the coins were rated. When the coins have possessed the value indicated, they have passed from hand to hand as of that value. When

they have been found not to possess that value, they have—*except within very narrow limits*—failed to so pass.

It is true that, at certain periods in the history of some of the States, the skins of the beaver passing by tale; strings of shells, known as Wampum, passing by measure; and packages of tobacco of defined weights, were, in the absence of the precious metals, used as money, and were made the medium of exchanges.

But none of these was a "legal tender" as money (2 Duvall, 63), or ever had anything but a local and limited circulation, or ever was used as a substitute for money, after money was introduced.

While in all ages of the world, in all countries, the precious metals, when stamped with a designated value, have been known as monies; and (with representatives of such monies), have always been the great and universal medium of exchanges.

Money of the Framers of the Constitution.

Not only has "money" meant *metallic* money, but, upon looking at the public history of the times (which this Court has established as a proper guide to its construction, 8 Howard, p. 24, 11. Peters, p. 332), we find that in the history of the country, there was no period in which "money" was more distinctly understood and meant to be hard money, than at the period when the Constitution was framed and adopted.

"Its Framers had just passed through all the horrors of an unredeemed paper currency." "The history of that currency had been within the view of those who staked their property on the public faith, always freely given, and grossly violated."—(11 Peters, 348.) "The mischiefs of the various experiments which had been made were fresh in the public mind; and had excited general disgust."—(3 Madison's Papers, p. 1345.)

With the Bills of the Government unredeemed,—indeed, become at last so hopelessly beyond redemption as to be entirely given up as worthless—the country had returned for circulation to a specie currency; to absolute money having an *intrinsic* value ; and neither had, nor wished, any other currency.—(Story's Com. § 1354).

But the context as well as the word itself shows that—

The power is confined to metals.

This grant is not a grant to *create* money, but simply "to coin money ;" a power that can be exercised only on money that admits of being coined. That is, a bare power to "strike coin," which was the phrase used in the Articles of Confederation as the equivalent of "to coin money." It was from those Articles that the words "to coin money and regulate the value thereof" were transferred to the existing Constitution. While the power as to regulating money is simply a power "to regulate the value *thereof*," that is, of the money coined, "and of foreign coins." A power consistent, when applied to coined money ; absurd, when applied to foreign paper promises to pay. For how could Congress regulate the value of the promises put out by nations beyond its control ?

If, however, Congress could take the power of stamping leather, or paper, under this clause, and the leather or the paper so stamped could be considered as "coined money," the value whereof could be regulated by Congress ; even that would not support the legal tender provision of the Treasury notes.

With such a power, Congress might, indeed, stamp a lump of leather, or a ream of paper, so that they should circulate as current money; that, however, would not make these notes such stamped paper, nor current money.

Treasury Notes have no intrinsic value.

For your Honors will observe that these notes have, *as*

substance, no appreciable value whatever. They are not declared to be, and do not purport to be, of any value as substance. They are not stamped with any intrinsic value. They are not, so far as they possess value, things at all, but only things in action. The material holds the evidence of the promise; but it is the promise, and the promise alone, which is, and which purports to be, of value. One dash of the pen across the signature F. E. Spinner, and this is not a Treasury note; not a thing in action, not a matter which bears the Government stamp of value ; not ten dollars at all, but a worthless rag of paper, once used to hold a promise, now cancelled.

If, therefore, "money," in the phrase "to coin money," could be considered as embracing other *substances* beside those precious metals, alone in use throughout all the world as coin, none the less would it remain, that to utter *promises* to pay money would not be "coining," or "to coin money."

Concurrence of opinions.

I can not find that, before the passage of this Legal Tender Act, it had ever been supposed by any Court, or by any Judge of any Court, or by any Commentator or Statesman, that this power "to coin money" had reference to anything but a metallic currency. Indeed, of all the Judges who have given opinions, as well in support of, as against the legality of this law, I find but one, the learned Judge who dissented in this case below, who does not concede that to "coin money" was a grant of power relating to the coining of the precious metals.

Nevertheless, although the power to coin money has not sufficed to support the right to make these Treasury notes a legal tender, the power to "regulate the value thereof," (that is, of coined money), has been taken as one of the most effective arguments to support this law.

If, under this power to regulate the value of coined monies, Congress may debase the coinage; if it may put upon the coined monies any other than their true intrinsic value; if it may declare that one-half or three-fourths of a dollar, when stamped by it as a dollar, shall be taken to be equal to a whole dollar, and may thus impair the obligation of contracts, and transfer one man's property to another; why, it is asked, under the constitutional power to borrow money, and other delegated powers, and the powers necessary and proper to enable it to excercise the delegated powers, may Congress not do a like thing to produce a better result with these Treasury notes? To this we answer:

SECOND POSITION.—This power cannot be implied from the power to regulate the value of money.

For, *First:* Congress has no power given it to regulat the value of the money it borrows; but only of the money it coins, and of foreign coins. The analogy claimed would exist if the Constitution gave Congress power to *borrow money, and regulate the value thereof.* But that it does not give.

And, *Secondly:* Congress has no power to even materially debase the coin. *A power to regulate is not a power to destroy.*

I quite agree that "an uniform course of action involving the right to the exercise of an important power for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised." *Briscoe* vs. *Bank of Kentucky* 11 Peters 318.

But your Honors will find, I think, from a careful review of the Legislation of Congress on this subject, not only that Congress has not, (as the Court of Appeals in New York, and the other Tribunals which have affirmed the validity of this law, seem to have assumed), exercised

plenary power over the subject of currency and the legal tender Laws (27 N. Y. 425, 426): but that, on the contrary, the legislation of Congress from first to last has been strictly confined to designating the value of *coined money, and to discriminating with reference to its real value.*

Legislation on coinage.

From the establishment of the Government to the passage of the Act authorizing Treasury Notes, the Legal Tender coin has been three times debased, and three times only. Once, in June 1834, when the gold coinage was reduced about six per cent. in value; once, in 1851, when the three cent pieces were first coined; and once, in 1853, when the *fractional silver* coinage was reduced some six per cent in value. But the pieces of these latter coinages were *restricted as legal tender within such very narrow limits, and for such fractional and special uses, that, practically, these Laws did not operate as debasements of the coin at all.*

From the first issue of coin by this government to this time, the unit of calculation and of coinage, the silver dollar, equal in value to the Spanish milled dollar, has remained the same. It remains still of the same weight and fineness as when first coined: whatever changes have been made, have been made to bring the other coin into more actual and just relation to it.

Standard first adopted.

When the subject of coinage was first considered by the Confederation, it was proposed to have a unit of account and of coinage much smaller than the dollar, and to employ the decimal system. Jefferson, while recommending the adoption of the decimal system, suggested a coin equal to the then existing Mexican dollar, as the

unit of value. His recommendation was adopted, *and the dollar has ever since remained the same.*

Randolph's Jefferson, Vol. 1. 395 6. *Jefferson's paper on coinage, in appendix to his works.*

The first coinage was under the act of April 2, 1792; and that Act provided that the coinage should be both gold and silver, and *that the relative value of the two metals should be as fifteen to one.* (*Section* 11.) That is, that one ounce of gold should be taken as the equal of fifteen ounces of silver. By that rate, one gold eagle would contain two thirds as much gold of standard fineness as there was silver in one silver dollar, and one silver dollar would equal in weight three half eagles.

Both of these precious metals were, after that, coined as money; both became lawful money and therefore, *ex necessitate*, a tender in payment of debts due in money, even if not so declared by law: just as coals of the specified kind are a lawful tender in discharge of a contract for coal; and cotton, of a contract calling for cotton.

But, in the lapse of years, the relation in value existing, or established by Congress in this Act of 1792, between the two precious metals, was lost. Owing to the increased produce of silver, and perhaps to the increased demand by the commerce of the world for gold, their relative value had so materially altered, that, by 1823, the Secretary of the Treasury called the attention of Congress to the fact, that gold had relatively appreciated in value, so that their true relation was then as *sixteen* to *one;* and to the evils resulting from the erroneous standard maintained.

Cong. Debates, 6th Feb., 1823, p. 859.

For as soon as gold had advanced, or silver declined, in relative value, so that they really bore to each other the relation of sixteen to one in value, instead of fifteen to one, as they were valued by the Law, every person who could

secure an ounce of our gold coinage for fifteen ounces of silver, secured what was intrinsicly worth sixteen silver ounces; that is, made a profit of about six per-cent. It followed, of course, that all the gold was taken up as fast as coined, and sent out of the country to be recoined, and that the country retained, instead, only silver, and the gold coins of those countries whose gold coinage bore a true relation the existing value of gold and silver.

In fact, our gold coin went regularly directly from the Mint, as fast as coined, to the foreign packet; and, out of some twelve millions of dollars of gold which had been coined, it was computed there was hardly a gold piece to be found in the whole United States. As was said in Congress, "Hitherto, like the tracks to the lion's den, the coins have gone all one way,—to Europe: and not one solitary Eagle has ever made good its Cis-Atlantic flight."

Congressional Debates, June, 1834 p 4654.

Standard corrected.

This evil led at last to the introduction into Congress of a Bill to regulate the value of the gold coinage of the country, by adjusting the rate for gold coin to its true relation to the existing, and continuing, silver coin.

The debate upon the Bill (Congressional Debates, June 21st, 1834), shows how anxious Congress was to get at the true relative value of the two precious metals and to fix the coinage accordingly. Opinions as to the relative values of gold and silver ranged from 15.60 to 1, to 16 to 1. The majority of those best calculated from their pursuits to understand the subject, including the New York Banks, regarded the true ratio to be as 15.62 to 1; although, for the previous few years, it had averaged 15.80 to 1. But Congress, at the instance of the friends of metallic money, determined to adopt 16

to 1 as the relative values. Partly, because that seemed to be the ratio which had proved practically the most correct in the nations which had adopted it; partly, because the variation from the true relation was, if any, so small it might safely be disregarded; and partly, because it was believed that the relative appreciation of gold, which had been so long going on, would continue, and that the slight over-valuation of it, if any there was, would be thus in time corrected.

1 Benton's Thirty Years, page 469

But, so far from Congress assuming any power to materially depreciate the coinage, or impair the rights of creditors, the power of Congress to make depreciated coin a legal-tender was expressly disclaimed in the debate. (Congressional Debates, June 21, 1834, pp. 4650, 4652–3.) And the statesman, at whose instance and by whose will this bill was mainly carried through, was, of all men who ever had part in the Government of this country, the very last one to be quoted on the side of the power of Congress to make promissory notes legal-tenders in payment of private debts.—THOMAS HART BENTON.

Effect of change in gold coinage.

Your Honors will see that, while Congress did indeed reduce the standard and value of the gold coinage, so that one hundred dollars of the new gold coins were hardly equal in intrinsic value to ninety-four of the former gold coinage; yet that, in fact, Congress did absolutely nothing to impair the obligation of contracts, or to destroy the rights of the creditors.

For, from the beginning, the debtor had the right to pay in the coinage of either of the precious metals. At first, these were of equal value, and payment in either was indifferent. Gradually the gold appreciated, or the silver depreciated, and then, of course, the debtor, as he had the option, paid in silver. So that, in 1834, the

debtor who owed $1,000, and had $940 of the then gold coinage, could exchange his gold for $1,000 in silver coin, and discharge with these his debt of $1,000.

Therefore, although Congress did reduce the value of the gold coinage in 1834, the debtor, after 1834, could no more pay his $1,000 with money of less intrinsic value, than he could before. True, he could take $940 in gold of the old coinage, and get with it $1,000 in gold of the new, with which to pay his debt. But so, before the law, he could take this same $940 of gold coinage, and purchase $1,000 of the then, and still, equivalent silver coinage, with which to pay the debt. Indeed that law, so far from taking one-sixteenth of the debt from the creditor and giving it to the debtor, as at first appears, actually gave the debtor no new privilege, and deprived the creditor of no property. It remained optional with the debtor, after the law as before, to pay in the gold pieces of the old coinage. True, it became possible, after the law, for the debtor to pay in the new gold coinage; but it had been optional with him before the law to pay in the constant silver coinage *equivalent in value* to the new gold coinage. The law was, in fact, but an adjustment and recognition of the true relation between the values of the two metals the selection between which had always remained optional to both debtors and creditors; and, so far from being an attempt by Congress to create a legal tender without reference to, or differing from, the the intrinsic value of the thing to be tendered, it was, on the contrary, a most careful and earnest effort to bring the recognizable value of the thing to be tendered, more closely to its intrinsic value.

Cong. Debates, June, 1834, pages 4643-4671.

Following this Act of June 28, 1834, Congress passed an Act on the same day, conforming the value at which foreign coins were to be rated, to their true intrinsic value.

Change in the silver coinage,

For nearly twenty years after the passage of these laws of 1834, the relations between the precious metals remained undisturbed, so that no action by Congress was required. But the unlooked-for discoveries of gold in California disturbed again, and in a reverse direction, the relation between the two metals, and thereafter silver advanced, and gold declined, in relative values; so that, by 1853, a scarcity in silver coin had been felt. Congress, however, did not thereupon generally depreciate the silver coinage. It was, indeed, urged upon Congress, and I think wisely, to appreciate the gold coinage.—Vide New York Tribune, and other Journals.

Instead, however, of doing this;—thinking, probably, that this gold harvest was to be of short duration, and its disturbance of the relation, then so long subsisting between the two metals, not likely to continue; and striving to meet the evil of shin-plasters and paper tokens for change then pressing—Congress did depreciate the silver coin, for parts of dollars, about six per cent.: (so that two half dollars or four quarter dollars are no longer equal to one dollar piece). But these depreciated coins were restricted from being legal tender for any sum greater than five dollars in all, although the smaller silver coin of the earlier coinage remained a tender for any amount.

Prior to this, in 1851, Congress had directed the coinage of three cent pieces of a fineness and weight which gave them a value of only eighty cents on the nominal dollar of these pieces (*i. e.*, thirty-three pieces of three cent coinage were worth intrinsically only 80-100 of one silver dollar); but these pieces were only made tender to the extent of thirty cents in the aggregate: and their issue was shortly stopped, and by the Act of 1853 their intrinsic value was raised to the standard of that of the other fractions of the dollar.

Edelman's Bullion Dealers' Guide, p. 14, 15.

Chapter xx., 31 Congress, Session ii.; Chapter lxxix., 32nd Congress, Session ii.

Change in the Copper Coinage.

Congress also in 1793 and 1796 reduced the weight and the intrinsic value of the cent to accord with the increased value of copper, the planchets for which Government had to import (Report as to the Mint, Cong. Debates, July, 1823, 804.) These cents, however, were not made a legal tender.

The interference by Government with the rights of creditors by regulations of the coin have, therefore, been :

1. By the acts of 1834, a possible, but disputed and doubtful depreciation, if of anything, of less than one per cent.

2. By the act of 1851, a depreciation of fractional silver coin (the three cent piece), to an extent which could not, in the largest tender, exceed six cents ; shortly, however, altered, so that it could not exceed in the aggregate two cents.

3. By the act of 1853, a depreciation of fractional silver coinage to an extent which could not exceed in the largest tender thirty cents.

Debasement too trifling to be regarded.

Now, if these debasements of fractional coin be deemed merely such; nevertheless, from their minute and fractional nature, they would form no precedent for future material debasements of the coinage, or indicate any acquiescence by the people and the courts, in an assumption by Congress of the right to put a false or arbitrary value upon its coined monies. *De minimis non curat Lex.*

Practically, there has been no debasement of the coin.

But, indeed, these Acts of 1851 and 1853 were practically not at all infringements upon the rights of creditors,

or debasements of the coinage below its value. I remarked (page 4), that when coins were struck with a value which they did not possess, they have, "except within very narrow limits," failed to pass at more than their true intrinsic worth. But there are limits within which coins somewhat depreciated below their true value, will circulate as well as if they had not been depreciated. Those limits are when the payment is so small that the difference between the nominal and intrinsic values does not leave it worth while to regard the difference; or when some particular convenience about the coin, such as its portability or denomination, overbalances the intrinsic depreciation. That is, the peculiar fitness for the fractional purpose required, will, in such cases, actually make good the depreciation, and carry the small coin, for all purposes of use, up to the stamped value.

Your Honors will recollect how often in the days of the Spanish piece for 12 ½ cents we accepted 12 cents instead, and took Spanish quarters with holes drilled through them equally with perfect coin. And I am informed by Mr. Ruggles, Delegate to the International Coin Congress, that the sovereign has so depreciated by wear that a large majority of the coins in circulation in Great Britain are intrinsically worth two pence per sovereign less than the standard value; and yet, for all minor payments, they pass from hand to hand by tale equally as of full weight; while in large transactions, they are always paid out by weight and not by tale. So with the depreciated three cent pieces of 1851; within the limit at which they were legal tender, their portability and convenience made up what they wanted in intrinsic silver value.

And so, too, with the depreciated coinage of 1853. It was confined to fractions of a dollar, which were so slightly depreciated, and the convenience of which was such, that the trifling intrinsic loss was not to be regarded. But the depreciated coins were made a legal tender only

to twice the amount of the lowest tenderable gold coin; Congress still keeping to its idea of a double money standard, and still holding to its unchanged unit of value, the silver dollar.

Regulation not debasement.

Now I submit that all those exercises of the powers of Congress to "coin money and regulate the value thereof," were within the letter and spirit of the Constitution. Congress has, indeed, established the value of certain foreign coins at one time, and changed it at another; made them a tender, and deprived them of that quality; and changed from time to time the standard of value of coin struck at its Mint. But how has it done this?

Without regard to the intrinsic value of the coin struck? By fixing upon it any arbitrary value, and making it a tender at anything but its true value, as all the Courts which have supported the Constitutionality of the provision we are considering have assumed? Not at all; but on the contrary, by uniformly seeking to conform the stamp upon its coin to its true value, and by scrupulously limiting the departures from intrinsic value for special purposes, within limits so narrow, that the special usefulness of the coin within those limits has actually made good the trifling deficiency in weight.

In the same spirit, Congress has provided that its coin shall be a legal tender at its stamped valuation only when of full weight: if of light weight, only proportionately, according to its weight.

In fine, Congress, under a power to coin money and regulate the value thereof, has done only and exactly what those words in their plain signification imply; has struck metallic coins, and has regulated the value thereof and of foreign coins; and has done this on every occasion with careful regard to their true intrinsic value; manifesting, as well by the particular purposes, and narrow limits within which they have departed from

intrinsic value, as by their general strict regard for such values—not their belief that they could strike any metal, and stamp it with an arbitrary value—but that they could rightfully regulate the value of money only by truly declaring the value thereof. Not that they possessed a magic power, as thought the learned judge, (Williams), who dissented below, to give by their omnipotent fiat, a precious value to inanimate and valueless things; but that they possessed only power to regulate the coin stamped, by declaring its value according to the fact—according to the value stamped upon it when of full weight, and of only proportionate value when of light weight.

Misapprehension as to the action of Congress.

In the opinions in these legal tender cases, nothing has seemed to go so far toward supporting the authority of Congress to make Treasury Notes a legal-tender, as the assumption that Congress had been left by the Constitution at liberty to impair private rights and the obligation of contracts, by debasing the specie coinage, and that it had actually debased that coinage and impaired those rights to the extent of one sixteenth, without question or challenge.

Had this been the action of Congress, it would not indeed have established its power or right to do this. One permitted invasion of an established right does not do away with the right. That Congress had debased the coinage one-sixteenth would not establish the right to further debase it; would, at most, indicate that the power to regulate it extended up to that limit; and would, of itself, furnish no justification for a more general or further invasion. Nevertheless the assertion, in all the opinions, that Government had assumed to debase the coinage to the extent of one-sixteenth, impairing to that degree the recovery of all creditors; and that this ac-

tion had been submitted to without question ; has seemed to me the strongest argument for the power of Government to exercise plenary control over coined money. In deed, it was the enquiry as to how it was possible that creditors could have submitted to so serious an infringement of their rights without contest in the Courts, which showed me that in fact nothing of the kind really took place.

No plenary power over tender asserted.

On the contrary, we see that, so far from "Congress having claimed and exercised unlimited power over legal tender," as Judge Williams believes (Printed Record, p. 31): so far from having assumed the power to make even coin a legal-tender, without regard to its real intrinsic value, as all the decisions supporting this Law assume; its Legislation shows that for seventy-five years, from the beginning of the Government down to the Act authorizing these legal tender notes, through all the most pressing exigencies of peace and war, Congress,—not only by its direct efforts to regulate the coinage from time to time, according to its intrinsic value, but also by the narrow limitation it imposed on the right of legal tender when diverging slightly from intrinsic value for special and temporary purposes—has shown a determination, as uniform as just, to keep the stamp upon the Government coins a true index to their value, and to so regulate these coins as that they should have and express their actual values. Nay, by reference to the Debates in Congress, it will be seen that the right of Congress to debase the coin and make the debased coin legal tender, in such wise as to materially affect the rights of the creditor or debtor, was not only never professed or asserted, but that, so far as the question has arisen, the right has been directly repudiated.

Difficulty of the New York Court.

So, therefore, the difficulty the Court of Appeals of

New York declares it had, in perceiving why, if Congress, under this power to coin money, could coin any metallic substance and stamp it with an arbitrary value, (which it says was not denied in that case, 27 N. Y. Rep. 430), it would not have equally the power to declare its treasury notes a legal tender without reference to their intrinsic value,—is a difficulty that your Honors are freed from, and that should never have existed.

Indeed, I look in vain to-day for the production of the declaration, prior to these legal tender days, of one Judge, one Statesman, one Commentator, that Congress, by the power "to coin money and regulate the value thereof," possessed the right of striking coined metals with false and arbitrary values.

The right, therefore, to make a promise to pay—a promise not expected to be kept at the time for which it was made, nor at any other certain or definite time,—the substitute for the thing promised; and to oblige every creditor to accept this of his debtor instead of the thing promised; is not only not within the provisions of this grant to Congress "to coin money and regulate the value thereof;" but we have seen that no kindred power in fixing the value of even coined monies, has ever been claimed or attempted under that grant.

We are driven, therefore, to seek in other parts of the Constitution, this power to make Treasury notes a legal tender between private parties at their nominal value for pre-existing debts.

THIRD POSITION.—The assumption by Congress of the right to exercise this power in a time of public danger is not conclusive of the right.

But it is claimed that the power of thus making the Bills of the Government legal tenders is a power "necessary and proper,"—in the sense in which these words are settled to have been used,—to carry into effect some one or more of the powers delegated to Congress by the Constitution. For we are told that by "necessary" and "proper" is meant no more than *useful* or *conducive;* and that Congress is the judge of what is useful or conducive. So that, if only the means *may be* useful or conducive to the end, and the end legitimate; if there may be any *possible* relation of the means to the end; then, *whether it is or is not really such a means, is for Congress to decide:* and that its decision is not open for your Honor's review —27 *N. Y. Rep.* 475–6.

Well, if this be so, that is an end of the balance and limitations of this Government.

If this be so, then your Honors, instead of holding a supreme tribunal to pass upon the rights of the other departments of Government, and to determine how far their action is warranted by the fundamental law from which all powers of Government are drawn, are nothing but a Court to settle questions of private right and property between individuals.

Why, it has been regarded as the special and distinct characteristic of this august tribunal, that it sits in judgment upon the rights of States and the powers of Legislatures. As Chief Justice Marshall well said in *Madison* v. *Marbury*:—"To what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained. The distinction between a Government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed," but all powers under the discretion of a choice of means are left open to them.

"The public safety, and the general welfare to be determined by the discretion of Congress, destroy all

limits to Congressional power. Their discretion only, is thus made the measure of their authority." *Peckham, J.*

Of course, if your Honors please, no such doctrine as that just suggested, can be maintained. It would suppose a despotism of the most absolute character.

"To a certain extent, the necessity and propriety of an enactment must rest in the discretion of the Legislature. But to hold that the exercise of that discretion is final, and not subject to the examination of the judiciary, would be to break down all limitations upon thn power of the Government. Accordingly, I think that no judge has ever intimated the existence of any such extreme doctrines."

Judge Denio, 27 New York Rep. p. 536.

"If it be asked," said Hamilton, "what is to be the consequence in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them; as if the general power had been reduced to particulars, and any one of these were to be violated. *The success of the usurpation will depend on the Executive and Judiciary Departments*, which are to expound and give effect to the Legislative acts."

Hamilton Federalist, No. XXXXIII.

The doctrine of this Court.

The utmost that has been said at any time by your Honors' Court, or indeed, by any Judicial Tribunal or authority, speaking to this subject, has been the rule given by that great Chief Justice who extended the Federal authority to the farthest limits which your Honors' Court has sanctioned.

"Let the end be legitimate; let it be within the scope "of the Constitution; and all means which are appro- "priate, which are plainly adapted to that end, and which

"are not prohibited, but consist with the letter and spirit "of the Constitution, are constitutional."

McCullough vs. State of Maryland, 4 Wheaton, 421.

We must inquire, therefore, to the exercise of which one of the powers delegated to "Government it is necessary and proper," it is even "appropriate and plainly adapted," that Treasury notes should be made a legal tender for antecedent debts.

Is it appropriate and plainly adapted to the power to borrow money,—to regulate commerce,—to raise and support armies,—to provide and maintain a navy,—to suppress insurrections or repel invasions, or even to any of these powers united? For it is true that Congress had occasion to exercise every one of these powers at the time when these notes were issued.

FOURTH POSITION.—The exercise of this Legal Tender power was not necessary, or appropriate and plainly adapted, to carrying into execution any of the powers expressly delegated.

Your Honors cannot read the opinions of any of the Courts which have held this law to be constitutional without finding their decisions distinctly put upon the necessity of this provision to enable Government to borrow money and carry on the war, and to maintain its very existence.

No Advantage in the Legal Tender Provision.

But it is respectfully submitted, especially after the experience of the past six years, that no such necessity existed, and that no such advantage was gained by the provision. On the contrary, at no time before, since the

establishment of the Government, was the national wealth so great ; at no time were private debts, in proportion to the means of the country, so reduced. The panic and suspension of 1857 had led to very general liquidation. The agitations of the succeeding years had tended to check men in forming new engagements, or entering upon speculative undertakings. At no time had so few new schemes for capitalists been proposed ; had so few bubble corporations been projected ; had so little general speculation prevailed. At no time were our traders so little extended, or had our people so few debts (excluding debts maturing at the end of long terms of years.) The Banks and the Government had already suspended specie payments for months before the issue of these notes. The entire business of the country was being done in unredeemed bank paper which was not a legal tender in payment of debts, but which, nevertheless, circulated everywhere, and never fell at the great centres of trade to any considerable depreciation. To supply its immediate wants the Government determined in February, 1862, upon an issue of treasury notes to the extent of one hundred and fifty millions, expecting at the time that it would need to borrow further large sums.

Security of the notes not increased.

Had these notes been issued without the Legal Tender clause, they would have been equally secure. That clause, of course, added nothing to their security. Without it, they still had, as fully as with it, whatever security the credit and faith of the Government could give them.

So, too, without that clause, they would have been equally as available and valuable as now, in all payments for taxes, public lands, or other dues to the Government.

The only value that clause did give the notes was the power it gave debtors to discharge pre-existing debts with them, equally as with real dollars. I say pre-existing

debts, because, as to subsequently contracted debts, the dealings of the country would have been in these notes, whether or not they had been made a legal tender. The country was, at the time of their issue, carrying on its dealings in the unredeemed paper money of the Banks styled "currency," in which all ordinary transactions were measured, and payments made. This currency had not at that time depreciated more than three per cent. below the specie standard; and yet treasury notes, as soon as issued, at once fell to the same depreciated value. Their legal tender character never seems at any time to have made them better than the bills of any other solvent but suspended debtors, not containing that clause.

No danger of general insolvency.

I know that it has been urged that general insolvency and ruin would have followed, had not debtors been authorized to meet their demands with these notes. But what really would have been the effect had these notes not have been made a legal tender for debts like my client's? Necessarily they would have been as well secured and as useful for payments of taxes and public dues, as now. They would have been as valuable as now, for the purchasing of goods, and service, and labor. True, the debtor could not have discharged his debts of long standing in them, but what of that? In great part, the debts of the country consisted of commercial paper, even then payable in what was styled "currency." As to the debts of the country not already specially payable in "currency," the great bulk of the residue matured within a short time, so that, had the debtors not been able to have benefitted by the slight depreciation in Treasury notes which took place during such times, it would have caused no wide-spread disaster. Specie payments have been suspended by the Banks and the Treasury in 1837, and 1857, and 1861, without producing any great ruin. Irredeemable paper circulated after the

suspension of the Bank in 1857 and 1861 as well as before. Indeed, the crisis was before the suspension of the Banks, not afterwards.

Experience of the Rebel States.

Upon this point no illustration could be more instructive than the history of the paper of the (rebel) Confederate government. Treasury notes were authorized by that Congress (Acts No. 58, March 9, 1861; No. 311, Dec. 19, 1861); were made receivable for taxes and public dues, (except export and import duties,) and were the general circulation of those States from their first issue till the final subjugation of the authority by which they were issued; always declining in value, but always receivable at a value fully proportionate to their chances of ultimate redemption. *And this, though never made a legal tender.*

Nay, although by law the right to insist upon payments in gold and silver remained, it was very rare for any one to assert the right. New contracts were made in these notes; their gradual depreciation alleviated the losses to creditors by distributing that depreciation through a series of creditors. Now and then a creditor refused to take them and discharge the security for some specific debt, and was left to hold his security. But these cases were few: sheriffs received these notes upon execution; damages were assessed in them upon trials; and, except in rare and unusual instances, they performed every service they could have performed had they been made a legal tender. They fluctuated in a ratio with the success of the Confederate arms, as did our notes. And they are a standing illustration for all time of how a people can put their last man into the field and sacrifice their last dollar, without issuing indulgences to one man to appropriate the property of another without consideration.

Effect of this provision.

But, if we were to concede that this quality of Legal

Tender gave to these Notes a material advantage, which they would not have possessed without it, how can it be said that this provision was "necessary and proper," or "appropriate and plainly adapted" to the exercise of any of the powers expressly delegated to Congress?

What is the effect of this provision but to take the property of the Creditor and transfer it to the Debtor to the extent to which these Notes may be depreciated below their nominal value? And to which one of the delegated powers is such a wrong "appropriate and plainly adapted"? If Government chooses to pay its own debts, or raise its monies, by the issues of Treasury Notes, there is a relation between the means employed, and the power to borrow money. But how can relieving my debtor more or less from his obligations to me be a means towards enabling the Government to borrow money?

How is "Commerce regulated" by the taking of my debt and the giving of it to my debtor? How can "armies and navies be raised and maintained"—how can "Insurrections be suppressed"—by doing the same thing?

But it is said that to get the right to do this with Government Notes, your debtor will give more for these Notes than he otherwise would.

Sale of indulgences to commit wrong.

Can it be that in a just and constitutional government, a forced loan,—nay, worse than a forced loan, for the Government did not get the advantages from these notes the Creditors lost,—that a *sale of indulgences* to one man to appropriate the property of another, is a "fit and "plainly adapted" means to the borrowing of money, or any other of the delegated powers?

Can it be said that, in a Government "ordained to establish justice," the permission to let me wrong you follows, "by necessary implication", (1 Wheaton 304), from any

of these delegated powers? To the exercise of which one does it properly belong? To the exercise of which one is it conducive, or plainly adapted? Why, to all, as much as to one. For, if it can be maintained that to further the exercise of any of the enumerated powers, Congress is authorized to do any unjust thing, having no other relation to the exercise of those powers, than that by that means Government is made richer,—any wrong may be called the exercise of some one of the enumerated powers; so that Congress may do this, or do anything whatever, without check from your Honors' Court, and be as absolute, for every purpose of wrong, as the Czar or the Sultan.

For your Honors will observe that no relation is suggested between borrowing money, or other enumerated power of Congress, and the legal-tender provision of the Treasury notes, which operates to transfer the creditor's property to the debtor, except that the Government gets paid more for its notes with this provision, than without. But Government would doubtless save all the cost of carrying its mails, and raise Revenue beside, if it would let the carrier levy a percentage on the contents of the letters. So, too, if it were to stamp short measures,—eleven inches for one foot, eleven ounces for one pound, and the like,—and ordain that all who used stamped measures might discharge pre-existing contracts with them, as if of full measure, it would surely get large revenues from such stamped measures. But I submit that such outrages would bear no relation to the delegated power "to establish post offices," or to "fix the standard of weights and measures;" even though the Government was thus made the richer. No more, it seems to me, can the power to deprive the creditor of his property for the benefit of the debtor be said to be "appropriate," or "plainly adapted" to the carrying into execution of any of the enumerated powers.

Uniform Currency.

But it has been claimed to be a proper regulation of com-

merce, for Congress to provide a uniform national currency; and that these legal tender notes were, in effect, a mortgage on the whole property of the nation, and therefore the best secured and most uniform currency the nation could have. Although, in truth, the security for this or any national debt is exactly the extent to which the people will consent to contribute through taxation to its payment.

But, however great the security, the uniform currency Congress should provide is a currency of unchanging value—not a currency the depreciation of which is uniformly felt. But these Treasury notes were not unchanging; they fluctuated in value from day to day with every pulse of news that flashed along the wires of the telegraph. They advanced and retreated in value with the march of armies; and there were days when their variations were so violent as to cause all traffic conducted in them to be suspended, and purchasers and sellers to stop dealing, except where they could carry on their transactions in coin. Our currency was uniform in nothing but the uncertainty it produced in all business.

The result has shown that the injustice the legal-tender provision did to pre-existing creditors, was a quality which added nothing to the uniformity of these notes. On that ground, therefore, these notes cannot, I submit, be regarded as a regulation of commerce. But if they had proved a uniform currency, none the less it remains, that to establish injustice is not a necessary and proper means of carrying into effect a power to regulate commerce, in a Government ordained to "establish justice."

FIFTH POSITION.—This power cannot be assumed as a necessary inherent sovereign right.

But it is claimed that the right to declare what shall be a legal-tender for private debts is a necessary sover-

eign right inherent in every Sovereignty. That, within the scope of their respective authorities, the Federal and State Governments are sovereign; and that, consequently, this power must be lodged with one or the other authority. And that, since it is prohibited to the States, and not prohibited to Congress, it must therefore be taken to dwell with Congress.

But upon what principle is it a necessary sovereign right? True, it is a right which has been exercised by absolute Sovereigns. So has every other form of power and plunder. But that does not make it a necessary sovereign right in a limited Constitutional Government ordained to establish justice. It is by no means clear that this right exists in England. *Blackstone* says that "the coining of money is the act of the sovereign power, *that its value may be known on inspection.* Every nation fixes on it its own impression, that the weight and standard, *wherein consist the intrinsic value, may be known by inspection only.*"

"Of this sterling metal all the coin of the kingdom must be made: *but the King's prerogative seemeth not to extend to the debasing or enhancing the value of the coin below or above the sterling value.*"

Blackstone Com., Vol. 1, 176-7.

Indeed, there are many prerogatives and many sovereign powers that cannot be exercised here at all, either by the State or Federal Governments. The amendments to the Constitution are mainly restrictive of such powers.

Upon what principle, then, can it be contended, that, because a power has been an attribute of sovereigns, it must belong to the Federal Government, simply because it is forbidden to the States?

Surely, this is a Government of delegated powers. Surely, it has not only the powers expressly delegated, but the further powers necessary and proper to the exercise of the enumerated powers: for these are expressly delegated also. But this tender power is not one of the

enumerated powers; it is not, as we have seen, one of the powers necessary and proper to carry into effect any of the enumerated powers. How, then, could the Federal Government have acquired it? That it is forbidden by the Constitution to the States to whom it always theretofore belonged, and is not delegated to Congress, argues, I submit, that the exercise of it was not meant to be permitted at all.

Weights and Measures.

With the clause giving it power to coin money and regulate the value thereof, Congress received also power to fix the standard of weights and measures. But can Congress alter the standard, reducing a pound to eight ounces, a foot to six inches, an acre to two roods, and thus provide that no man shall collect upon his contracts, and that no one need pay, more than one-half of what was bargained for? And if Congress can not do this arbitrarily and by itself, can it regulate the standard of weights and measures, by making sales of licences which would give to the holder for every dollar paid, a right to abate or increase an ounce, or an inch, or a rod, in every contract of sale he had made? And yet the right to fix weights and measures is a sovereign right and prerogative, as well as the right to coin money and regulate the value thereof.

Legal Tender a Substantive Power.

If your Honors please, this most sovereign right of legal tender, this power to take a man's rights and property, and transfer them without consideration, is a most substantive right; and it is well settled that a substantive right, cannot be implied as a means to exercise one of the delegated powers.

Notes receivable for Government Dues.

But it is suggested that since the bills of credit of the Government have been held to be a tender for dues to the

Government, they should also be held to be a sufficient tender for private debts. But what analogy between the cases is there? True, Congress holds its powers as a trustee. None the less, however, can it forgive its debtors, release them, and compound with them. It can, too, agree with them to take its own paper in payment of debts due to itself. Creditors usually do this. Upon principle of justice they generally should do so. But because a man takes his own protested paper in payment of a debt to himself, that is no reason why he should make other men take it for debts due them.

SIXTH POSITION.—The history of the Constitution and of the Country indicates that this power was not intended to be exercised at all, but was reserved to the people.

The Confederation never claimed the Power.

Looking to the history of the Constitution, how natural and probable it is that the power in respect to legal tender, now claimed by the Federal Government, was not intended to be granted to it.

The union of the Confederation was established for the same purpose as the present union. It was equally to be "perpetual." By the articles of Confederation, the Confederation had the identical powers given it in respect of money—viz; "to coin money and regulate the value thereof," which the Constitution gives to our Federal Government. And yet, when during the sore needs of the Revolution, it did issue treasury notes, and wished to make them legal tender, it found itself powerless to do so, and appealed to the States to make them tenderable.

Story Com. Constn. § 1351.

Effect of exercise of this Power by the States.

The States in their unlimited sovereignty did so; and with the result, Judge Story says, of prostrating all private credit and all private morals "entailing the most "enormous evils on the country; and introducing a sys- "tem of fraud, chicanery and profligacy which destroyed "all private confidence, and all industry and enterprise."

Story Com. Constn. § 1365.

Indeed, the framers of the Constitution had not only experienced the mischief of these experiments, which were in the Convention declared "to have excited the disgust of all the respectable part of America," but they realized also (11 Peters 339), that whatever "paper currency is not directly and immediately, at the mere will of the holder, redeemable in gold and silver, is, and forever must be, liable to constant depreciation."

Action of the Convention.

Accordingly, when the Convention came to consider the provision in the Constitution relating to borrowing money, which in the original draft read: "To borrow money and emit bills on the credit of the United States." Mr. Gouverneur Morris moved to strike out the words "and emit bills on the credit of the United States." Mr. Madison objected to this—that it would be "sufficient to prohibit making them a tender, as promisory notes in that shape might in some emergencies be best." Others thought that power, so far as it was safe, was involved in the power of borrowing; and, finally, *the words were stricken out* by a vote of 9 to 2: Virginia acquiescing because Mr. Madison "was satisfied that striking out the words would not disable the Government from the use of public notes as far as they could be safe and proper, and would only cut off the pretext for a paper currency, and particularly for making the bills a tender." Madison's Papers, vol. 3, p. 1346.

Action of Congress.

From that time, until the enactment of this Bill, who has ever asserted that Congress had the right to create a legal tender at all, except under the power "to coin money and regulate the value thereof and of foreign coins?" Within what narrow limits that power has been exercised by Congress, and how restricted to regulating according to intrinsic value, we have already seen.

Not only was this power never before asserted, nor even as we have seen, the power to materially debase the coin; but incidentally when it has been referred to, it has been repudiated or condemned.

Opinion of Supreme Court.

This Court in U. S. *v.* Marigold, 9 Howard Rep. 567, referred to certain Legislation by Congress, as—

"Appertaining to the execution of *the trust and the duty of creating* "*and maintaining a uniform and pure metallic standard of value through-* "*out the Union.* The power of coining money and regulating its value "was delegated to Congress by the Constitution for the very purpose, "as assigned by the framers of that instrument, of creating and preserv- "ing the *uniformity and purity of such a standard value.*"

And Chief Justice Marshall, in Craig *vs.* Missouri:

"The history of paper money has been referred to, for the purpose "of showing that its great *mischief consists in being made a tender.* But "we do not think the history of our country proves either that being "made a tender in payment of debts, is an essential quality of bills of "credit, or *the only mischief resulting from them. It may, indeed, be the* "*most pernicious.* The history of Massachusetts abounds with proofs of "the evils with which paper money is fraught, whether it be or be not "a legal-tender. Paper money was also issued in other colonies, both "in the North and South, and, whether made a *tender or not, was pro-* "*ductive of evils* in proportion to the quantity emitted."

Opinion of Mr. Webster.

And that great statesman who was called by his contemporaries the Expounder of the Constitution, who, himself belonged to the side of those who claim the most sovereign powers for this Government, declared—

"*Most unquestionably there is and there can be no legal-tender in this* "*country, under the authority of this Government or any other, but gold* "*and silver. This is a Constitutional principle, perfectly plain and of the* "*very highest importance.* The States are expressly prohibited from "making anything but gold and silver a tender in payment of debts; "and although there is no express prohibition, as applied to Congress, "yet, as Congress has no power granted to it but to coin money and to "regulate the value of foreign coins, *it clearly has no power to substitute* "*paper or anything else for coin as a tender in payment of debts and to* "*discharge contracts.* The Constitutional tender is the thing to be pre- "served, and it ought to be preserved sacredly under all circumstances."

And again he says:

"I am of the opinion, then, that gold and silver, at rates fixed by "Congress, constitute the legal standard of value in this country, *and* "*that neither Congress nor any State has authority to establish any other* "*standard, or to displace this.*—(4th vol. Webster's Works, p. 271, 280).

Other Opinions.

And it is significant to notice that in two of the most important speeches made in our late political canvas upon the side of the Party in power, both speakers indicated their belief in the unconstitutionality of this provision, and its danger to the just payment of the public debt.

One of the speakers, that distinguished scholar, our late Minister at Vienna, said:

"I leave to the Supreme Court the responsibility of deciding whether "Congress has the right to make anything but gold and silver a legal "tender for any debts. I am not a constitutional lawyer, or judge; but "this I do know, that the only justification of that proceeding in the "forum of conscience was necessity. It is one thing to palter with the "right because of necessity; quite another thing for convenience. *Ne-* "*cessity is a fury who knows no law.*"

The other, an eminent Judge, second in weight to no Judge of his party in New York, Mr. Justice Davis, said:

"All through the war it was a part of the Democratic creed that the "legal-tender act affecting the present greenbacks was unconstitutional "and void. So all their Judges held. So held Chief Justice Denio. "So Justice Woodward, of Pennsylvania. So held the Court of Appeals "of Kentucky. Our Courts sustained the act *upon the imperious neces-* "*sities of war.* But not yet has it been upheld by the Supreme Court "of the United States. And now, when there is no necessity except to

"anticipate debts not due in fifteen years, and thus defraud its credit-
"ors, it is proposed that the Government shall issue millions of green-
"backs, and declare them legal-tender. *There is not a Court in Ame-*
"rica that would not hold such a law void."

To recapitulate:

The Articles of Confederation gave the same power to the Confederation that the Constitution gives to Congress "to coin money and regulate the value thereof." Nevertheless the Confederation never assumed to make Treasury notes a legal-tender, but applied to the States to do it.

The State did make these notes a legal-tender, and with results which disgusted the people.

Accordingly when the Convention met that framed the existing Constitution, they struck out of the draft the power to emit bills on the credit of the United States, in order, as Mr. Madison says, that it might not be a pretext for declaring such bills a tender.

For several years, in the direst needs of the country, Congress not only never asserted any right to make Treasury notes a legal-tender, but, by the nature of its legislation, has indicated that it had no power to even materially debase the coin of the Republic, or stamp it with false and arbitrary values.

During these years this Court has spoken of the legal-tender as pernicious, and has pronounced the money power a trust delegated to Congress to maintain a pure metallic standard.

Not only Mr. Madison thought Congress had no power to make paper a tender, but Mr. Webster thought so; and the power has been frequently denied in Congress, and prior to the law in question never contended for.

No Framer of the Constitution, no Judge, no Commentator, is found prior to this law who claimed any such power for Congress.

SEVENTH POSITION.—The assumption of this pow-

er cannot now be justified here on the ground of supreme necessity.

It has been insisted in justification of this law that it was a supreme necessity, and one to be upheld for the safety of the Republic, whether authorized by the Constitution or not.

Well, I for one believe in the doctrine of the higher law. I believe that the Constitution was made for man, and not man for the Constitution. I can conceive that there may be exigencies when the object for which the Constitution was made could not be secured by the Constitution, but only dehors the Constitution; not by Constitutional means, but only by extra Constitutional means. When such a crisis should arrive, I can well understand how anyone connected with the Executive branch of the Government, might not hesitate as to the course duty urged him to pursue. The end is greater than the means.

Extra constitutional action.

But action dehors the Constitution, and action extra Constitutional, is not and cannot be Constitutional action. It is action to be justified, if at all, not because of the Constitution, but because of a necessity higher than the Constitution. Not by that supreme law, but by the yet higher law of the salus Populi, which the Constitution itself was intended to preserve. It is action to be justified to the people for whose benefit it was taken, and by the people whom it served. It rightly depends for its justification upon the exigency which required it.

So treated, such extra Constitutional action can never be dangerous. Each instance must stand by itself, resting upon the nature of the exigency which called it forth, and no instance be a precedent for another; and no such action can be protected by the Constitution which it has overstepped and violated.

Duty of this Department.

Whatever other branches of the Government may do in such an exigency, this Department can consider only the law. For the Judge who undertakes to pass upon such questions at all, there is but one path; and that is the path of duty.

That this provision was a supreme necessity to be adopted for the preservation of the Union, whether authorized by the Constitution or not, was a consideration to be addressed to Congress,—was the consideration, perhaps, which controlled Congress,—but is not a consideration to be addressed to your Honors.

Necessity has ceased.

But if the validity of this provision of the law is to be justified by the necessity for its adoption, that necessity has long since passed by. No insurgent flag now floats within sight from the steps of the building. No hostile armies manœuvre along yonder river. The report of Rebel cannon no more breaks upon the deliberations of the Congressional bodies. All this has happily passed away, not from this neighborhood alone, but passed from this whole land: and everywhere we have submission and peace.

Now if this law is to be justified by the extraordinary necessities at the time of its passage, how can it be justified after these necessities have ceased? If the safety of the nation alone justified measures so extra-Constitutional in the time of its peril, how are they to be supported, now that the peril is past. If the necessity has ceased which could alone legalize them, has not their validity then ceased also?

But, in considering the legality of a measure to be justified by the necessity of securing the purposes for which the Constitution was formed, we must remember what those purposes were.

Now for what purpose was the Constitution framed? To "form a more perfect Union." Yes, but that was not all; it was ordained also to "establish justice."

How, then, can an Act which establishes injustice, even if it aided in preserving the Union, be deemed a necessity for the preservation of the Constitution?

EIGHTH POSITION.—This law impairs the obligation of contracts.

Assumption that rights are not impaired.

It has been contended that this law does not impair the obligation of contracts: since the contract is simply to pay "dollars," and must, therefore, be satisfied by any thing that is a lawful dollar. But that begs the very question at issue; which is, whether this promise to pay must be received by pre-existing private creditors, instead of, and as the equivalent of, the thing promised. Giving to the promise the name of the thing promised, cannot make it the thing promised.

I know that it has been thought that this provision of the law does not really take anything from the creditor, and does not therefore impair the obligation of contracts. Indeed the Court of Appeals in New York seem to have put their decision largely on that ground. They regarded these notes as if their purchasing power was as great as if they were shortly to be redeemed. As if they possessed the same value as the coin they represented, except *for exchanges and speculation among brokers.* An exception arising, as that Court thought, from wicked speculations aimed at depreciation of the Government credit, and not to be recognized or commended.

I do not exaggerate. Pray let me refer your Honors to the opinions at pages 471, 482, 459, of the case in 27 New York Rep.

The results of the last six years have doubtless brought these learned Justices to other views of the facts; and I

submit that the misapprehension in this respect, under which they seem to have determined that cause, detracts largely from its weight as authority.

Assumption that Congress may impair the obligation of Contracts.

But, we are told Congress may constitutionally impair the obligation of contracts. Doubtless it may, where the Constitution directly delegates the power, as in the case of Bankrupt Laws; but in what other case? Why, it has been said in one case at Nisi Prius, that it could take back its own grants, and was not bound to observe its own contracts. Well, I do not believe that to be the law. Can it be, that under a Constitution framed to establish justice, the Government created should not be bound by its contracts. But the question here, is not whether it has the power to violate its own contracts, but whether it has the right to interfere and destroy the obligation of contracts existing between private citizens of one of the States, in defiance of the laws of that State; subverting the law of the State, and the effect of the contract, according to those laws. Is there any authority to be found for that? No. Nor, as it seems to me, is any ground advanced for it, except this claim that Congress, in order to execute the enumerated powers, can use any measures not prohibited, which it may select as a means. Congress has, indeed, a choice of means. It may select from any means "appropriate, plainly adapted to the end, and not prohibited;" *but Congress does not make the power that it may see fit to select "appropriate means," merely by selecting it.*

To hold this, would be to construe this Congress into a Government of absolute despotic unlimited authority, except only as to the powers which are expressly forbidden.

"No one ought to complain of the weakness of a Government whose powers *can be reasoned up* like this."

As was said in *Wilkinson* vs. *Leland:*

Though there may be no prohibition in the Constitution, the Legis-

lature is restrained from committing flagrant acts, from acts subverting the great principles of Republican liberty, and of the social compact, such as giving the property of A to B. (4 *Peters*, 646.)

That Government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free Government seem to require that the rights of personal liberty and private property should be held sacred; at least, no Court of Justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repungent to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention.—*Ibid.* p. 657.

Rule most liberal to Federal Power.

But, if your Honors please, no such rule has ever been established. On the contrary, the rule most liberal to Federal power and the authority of Congress yet asserted, is, that the implied power must be not only "appropriate and plainly adopted to the end," but also, "within the scope of the Constitution, not prohibited, and consistent with its letter and spirit."

NINTH POSITION.—This Legal Tender power was not proper, nor consistent with the letter or spirit of the Constitution; and was prohibited.

It was the fear of "misconstruction of the Constitution and abuse of its powers" by this doctrine, that Congress was the sole judge of what powers were necessary and proper to be exercised, to carry into effect the delegated powers; that induced the people to add to the Constitution their amendments.

Amendments to the Constitution.

What do these amendments provide? Not particularly

that Congress shall not impair the obligations of contracts. Not particularly that it shall not intervene to declare what shall be a legal-tender in discharge of pre-existing debts between citizens of any State. But they do provide that private property shall not be taken for public use without just compensation, nor any person be deprived of property without due process of law.

But this legal-tender clause takes my client's property to the extent of one-third of his right of action. Takes it, to be sure, not directly to the public use; but, as the other side claim, takes it because of the public necessities, and gives it to the debtor. Equally takes it from my client and takes it from him without any compensation. So, too, this legal-tender clause deprives my client of his property to the extent of one-third of his debt, of his chose in action, without due, or any, process of law. By what authority is this done? Not by the express authority of the Constitution; for that is not pretended. Not surely by its implied authority; for authority *to be implied* must be "*not prohibited*, within the scope of the Constitution, consistent with its letter and spirit." But this act which thus strips my client of his property without process of law is absolutely prohibited. It establishes injustice, and cannot therefore be consistent with the letter of the Constitution. Establishes injustice, and therefore is flatly opposed to its whole scope and purpose—*cannot therefore possibly be implied.*

TENTH POSITION.—No danger to the community would follow from holding this provision of the law unconstitutional; but the contrary.

We were warned by one of the Judges below, (2 Duval 74), that to hold these notes not a legal tender

would be to produce another commercial and financial revolution, wreck private fortunes, disturb private rights, and wantonly tamper with the great interests of society; and that, before Courts should be expected to pronounce judgments producing such momentous and sad results, a stern, unrelenting necessity to preserve the Constitution should be clearly demonstrated.

To these admonitions I might answer in the noble words of this Court uttered long ago, "that if the exercise of the jurisdiction imposed on the Court by the Constitution of the United States be calculated to bring on the dangers indicated, these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of the law."—*Craig* vs. *Missouri*, *Marshall J.*

But I take leave also to answer by a most emphatic and confident denial of the assertion.

Pray let us consider for a moment what would be the effect of a declaration by your Honors that the legal tender provision of this law as applied to pre-existing debts was invalid.

Effect if this Provision be held invalid.

As to outstanding debts contracted before its passage, the debtor would have to pay the full consideration received, instead of getting off by paying three-fourths or more (should gold continue to decline) of the consideration. But it is now six years since this law was passed; six years which debtors have had to prepare for this result: and very few debts contracted prior to 1862 are now left unpaid, except only those long loans of the great corporations which, maturing at remote periods, are in effect always renewed; and which, as a whole, only come due at periods so remote that we all look by those times for a practical equalization of the two currencies. Whatever your Honors' decision here may be, who is there

to be evilly effected by the decision I contend for? Not the great mass of debtors throughout the country, the banks, the merchants, the traders, the lenders and borrowers, who have dealt on the theory that these notes were legal tender.

I know that a general opinion prevails that if the legal tender provision of this law be here declared unconstitutional, every man who has borrowed Treasury notes must pay in coin, returning in value four where he got three or less. And if this were so, such a result might be disastrous to debtors, especially if the decision were to come suddenly. But this cannot be so; and I should hope, if your Honors should arrive at our conclusion as to the invalidity of this law, you would, in view of the public importance of correcting that error, express your views in respect of it.

Debtors not without remedy.

From the time these Treasury note dollars were found to be not a legal tender in the districts, where they have been considered such for the past six years, what would follow? A man has borrowed ten thousand dollars in Treasury notes; he has given his obligation for it, expressed, generally, in "dollars." The day of payment comes, and he tenders ten thousand Treasury note dollars. The payment is a good payment; it is all the consideration that was received; it was all the "dollars" that was intended in the contract; it was all that was really purposed to be paid. The creditor, however, we will suppose, declines the tender and proceeds upon the contract; the debtor has promised, to be sure, to pay "dollars," which, in the contingency I am supposing, will then be taken to mean coined dollars. But, upon the trial of that action, the debtor can prove that the dollar of the contract meant not the coin dollar of larger value, but the Treasury note so-called-dollar, of one-fourth less

value, and so the creditor will have judgment *according to that value*.

8 Peters, 198; 3 Conn. 273; 10 S. and R. 93; 12 Ill. 185, 9, 190, and cases cited; 14 Ill. 105; 4 Ark. 175; 16 Iowa, 243; 1 Texas, 373. 7 Humphreys, 33.

This obvious and simple justice might not follow upon the simple repeal of the law, since, assuming the law to be constitutional, that repeal would operate as an absolute appreciation of the existing dollar one-fourth in amount.

To this obvious and simple justice, however, it may be objected that, a dollar being defined by law, evidence that the contract meant something else than the coin dollar could not be received. But it should be remembered that this rule is a technical rule of evidence, made to prevent a party varying the higher evidence of a writing, by the lower evidence of parol testimony as to some secret fact or meaning, and has no application, in principle or reason, to the general notorious public designation of a thing by an improper name. And that in such case, not only should evidence of the special use and meaning of the word be admitted, but, when that use is sufficiently defined and public, it should in such localities be presumed.

23 Wendell, 76, and cases cited.

But were this otherwise, the debtor would not be remediless. He could always have his contract reformed in equity, and made to express, in the case I assume, its true meaning of ten thousand Treasury note dollars; just as a man in New York who contracted to receive two thousand tons of coal;—meaning gross tons of two thousand two hundred and forty pounds, whereas the statute of that State had fixed the ton at two thousand pounds; —had leave to reform his contract so that it expressed gross tons.

9 Paige, Rep. 195, 8 Wheaton. 215.

But now in New York, and most of the Northern and Western States, no such Bill would be necessary; but the

application to reform might be made part of the defence, and the whole merits be disposed of in one trial.

These causes establish that, in case your Honors should hold the Legal Tender provision of the treasury notes to be unwarranted by the Constitution, debtors will not be at the mercy of creditors, or compelled to pay in coin more than the equivalent of the value in coin of the Treasury note dollars they received.

Return to specie payments.

It would then, I think, naturally follow from such a decision here, that we should have a gradual return to specie standards and payments. The first effect, indeed of such a decision would be that coin dollars would become our standard of value, as now in California: rating our Treasury notes truly according to their real depreciation. This, though a mere matter of expression and account, would have, it seems to me, the effect of introducing juster views of real value, more caution, more economy, and less willingness for speculation and extravagance.

Advantage to the public credit.

And, if your Honors please, whatever danger there may be to the public debt of this great Country will come, not from the unwillingness of the people to pay; not from their want of ability to pay; but will come, if it shall come at all, from the recklessness of a people carrying out their schemes upon the waves of an inflated currency, and from the demoralization which such speculation produces.

If your Honors lived in that great City in which the Attorney General and I have our offices: if your Honors

realized, as I realize, how this flood of paper money, continued since the war without restriction or redemption,—itself an uncertain and fluctuating unit, affected with those qualities all calculations based upon it, in arithmetical proportion to their magnitude; how the facilities for getting wealth, the uncertainty attending it, and the fluctuation in prices, to which the war has accustomed men, have induced the frightful heights to which extravagance and speculation have mounted; and, above all, the mania to make haste to be rich, which prevails; your Honors might well pray for some check on the reckless propensities of this people.

Demoralization from legal tender notes.

I tell your Honors that a whole community is being demoralized. Men will do what they would shrink from eight years ago. When the wicked prosper, other men make haste to do likewise. And now, not from the cities only, but from every part, men seek the great marts to try their fortune in the ventures of the hour, hoping to gather where they have not toiled. Gambling in stocks, with the dangerous combinations it invites, and the corruption it encourages, has become general; so that it is deemed venial to artificially inflate or depress prices, to create fictitious values by forced scarceness, or undue depression by combined attacks. Nay, public journals and men of influence, and even actions at law, are made part of the machinery to these ends.

Check to these evils.

To check this evil, no influence can be more salutary, no restraint more gentle, or more useful, than for the community to feel that it must return to dealing, to receiving, to borrowing, and to paying, in real dollars; dollars that are what they purport to be.

Importance of enforcing limitations of the Constitution.

Nor is this all. For greater even than this public benefit, or than any question of commercial prosperity, well-being or policy, involved in this matter, your Honors have now to determine the Constitutional limits to the powers of Congress. Let your Honors, by your judgment here, decide that Congress, in the exercise of its great powers to borrow money, regulate commerce, maintain armies and navies, and the like, can adopt any measures it may think fit in order to carry out those powers; and, as it seems to me, the last barrier to consolidated government will be broken down, and this nation will be delivered over bound to an absolute Congress; and instead of the limited and localized system of government established by our fathers, we shall have passed irretrievably into a consolidated, absolute, centralized government.

Let your Honors hold, as your predecessors held, that Congress has no choice of means, but means "plainly adapted" to the end, means "within the scope of the Constitution," not prohibited but consistent with its letter and spirit, as to all which you are to be the judges; and that therefore, this power of declaring Treasury notes a Legal Tender for pre-existing debts is not granted to Congress; and then this wave of centralization will be rolled back; and, to a sound and permanent, because moderate and legitimate, prosperity, you will have added the rescue of that system of localized and limited government in which alone true liberty can be found.

To one of your Honors was accorded the duty, and the privilege, of directing the Finances of the Country during the darkest days of the great Rebellion. To him it was given to rise, equal alike to the danger of the emergency, and to the patriotism and fidelity of this people. Under his wise plans, this Nation poured out treasure like water.

Of him, as justly indeed as of Hamilton, might it be justly said that "he smote the rock of the national resources, and abundant streams of revenue gushed forth." But, as it seems to me, his will be a higher duty and privilege, if,—now that he is transferred to the other Department of Government, and required to pass upon the Law he recommended,—recognizing, in the single respect in which this Law was unnecessary, or at least no longer necessary, that it was also extra-constitutional, he should so declare it; and thus aid in confirming upon a foundation of wisest justice,—let us hope for ever,—this Government he has done so much to preserve.

CLARKSON N. POTTER,

of Counsel for the defendant in Error.

Mr Justice Clifford

Supreme Court of the United States.

December Term, 1868.

IN THE GOLD CASES.

BRIEF

(AS TO THE VALIDITY AND EFFECT OF CONTRACTS PAYABLE IN SPECIE)

OF

CLARKSON N. POTTER,

OF NEW YORK.

NEW YORK:
SAMUEL HAMILTON, BOOK, LAW AND JOB PRINTER,
No 61 Cedar Street, Adjoining Post Office.
1868.

Assuming, as I shall for this discussion, that Congress had power to declare Treasury notes a legal tender in payment of private debts, the question whether a promise to pay a certain number of specie dollars, can be discharged by a tender of the stipulated number of Treasury-note dollars, seems to depend upon whether there be, *in fact*, legal-tender dollars of different actual values ; and if so, whether courts are prevented, either by positive enactment or public policy, from recognizing this existing fact.

First Point.—As a matter of fact, there are four legal-tender dollars of different value :

1. The gold dollar coined *since* 1834, of the value of 100 cents, (meaning by a cent, 1-100th of a gold dollar of that coinage);
2. The gold dollar coined *before* 1834, of the value of 106 of the same cents ;
3. The silver dollar, now of the value of 103 of the same cents ;
4. The Treasury note dollar, now of the value of 75 of the same cents.

I do not refer to the fractional silver coinage, since that is *not* legal-tender, except for very small sums.

The Court will find, herewith, a table of the coins struck at the Government Mint, showing their respective fineness, weight and value, made by Mr. Edelman, Deputy Treasurer of the Government at New York. The note and corrections in writing (p. 14,) are by him.

The relative value of the Treasury-note dollar appears, I presume, as proof in these different gold cases. In speaking of it now, I refer to the current value of the day.

These differences in the value of the coin dollars were not the result of a design by Government to coin dollars of different values; but were the result of changes in the relative values of gold and silver. The gold and silver money of the coinage of 1792 were, at first, of equal intrinsic value. But, by 1834, gold had so appreciated, that one hundred gold dollars of the prior coinage were worth about one hundred and six silver dollars. Government then depreciated the gold coinage six per-cent., intending to make the gold of its subsequent coinage equal in intrinsic value, dollar for dollar, with the silver coinage. Since 1848, however, the value of gold has moved in the *reverse* direction; so that the gold dollar coined *since* 1834, is three per-cent. *below* the constant silver dollar, which it equalled in value in 1834; while the gold coined *before* 1834, is now but three-per-cent. *above* the silver dollar, which it exceeded in value six-per-cent. in 1834, but only equalled in value in 1792.

Now, if the existing differences between these "dollars" can be regarded, let us consider the effect of contracts made with reference to such differences.

SECOND POINT.—Although these dollars are not equal in actual value, yet, as each is a "dollar," it can *therefore* be used to discharge contracts pay-

able simply in "dollars," *because it complies with the terms of the contract.*

When a man loans money, payable merely in "dollars," he must receive payment in whatever the law may declare to be "dollars" when the contract is enforced.

The dollar may have *ap*preciated in value (as was proposed in 1853,) and the creditor would gain; or it may have *de*preciated, and the creditor would lose: but, as both parties *have agreed* to take the risk of the law, and to pay and to receive what the law might fix to be "dollars," the risk is equal and the contract *properly* fulfilled according to its own terms by such payment. (Story on Promissory Notes, §390).

So, if a man were to contract to deliver one thousand barrels of apples, a delivery of so many barrels of merchantable apples—whether pippins, greenings, or other variety of apples—would meet the terms of the contract and satisfy it. Or, if he were to contract to deliver one thousand cords of "hard wood," he could meet that contract by a delivery of the stipulated quantity of hickory, beech, or oak wood; since each of these is a hard wood, and so meets the terms of the contract. If by the contract it was intended to require a particular variety of hard wood, the contract should so have specified. Otherwise, it leaves with the *debtor* the selection of the variety of the general article agreed to be paid.

But where, in fact, different varieties of one article exist, and the parties contract for the delivery of a particular variety, such a contract is not satisfied by the delivery of an inferior variety of the same article.

Therefore, if A were to contract to deliver B one thousand barrels of "pippins," he could not meet that obligation by tendering one thousand barrels of inferior fruit.

Or, if he contracted to deliver one thousand cords of "*hickory* wood," he could not satisfy that agreement by

the delivery of one thousand cords of "*beech* wood." Both the pippin and the greening are apples, and each is good to meet a contract payable generally "in apples;" both hickory and beech are hard wood, and good to meet a contract payable generally in hard wood. Each variety has, for contracts payable generally in the class to which it belongs, a like power, because within the terms of the contract. But the greening is not the equal of the pippin. In no proper sense whatever is it of the same legal value; since a portion only of the latter may be sold or exchanged for enough of the former to meet the contract. And so of the other homely illustration of the hard woods.

Upon the principle, then, of having respect first "to that which is agreed, which is the very basis and foundation of law," and protected by the fundamental law itself, a man who has contracted to deliver one thousand dollars of the coinage prior to 1834, should not be allowed to discharge his obligation by the tender of a thousand gold dollars of the present coinage (worth only nine-tenths of the other)—*unless, indeed*, there be some positive enactment or some public policy to oblige the Court to regard these things, unequal in themselves, as equal in law: nor, having agreed to pay one thousand specie dollars generally, (which gives him the choice of coinage), should he be allowed to meet his obligation by the tender of one thousand dollars in paper notes, worth nearly a third less than the same sum in coin.

We have, therefore, to enquire whether parties are prevented from contracting with reference to, or Courts are prevented from recognizing, this difference in the actual value of the dollars that Government has put out. When the law declared the Treasury notes "lawful money and a legal-tender," did it mean that a Treasury-note dollar should be a lawful dollar, and so meet all contracts payable generally in "dollars;" or did it further mean that it should be taken and deemed not only as a dollar, but as the equal of the coined dollars?

THIRD POINT:—No value has been prescribed for the Treasury note dollar by Statute; nor is there anything in the Law to prevent private parties from contracting with reference to the actual existing difference in value of the different dollars.

Assuming that Congress had power to pass such a law, it might have declared, not only that Treasury notes should be legal dollars, but that in law they should have the same value as coin dollars; and then, in the eye of the law, the paper would have to be regarded as equal to the coin, and by a legal fiction the Court would be forced to treat the less and the greater as equal.

But Congress has not so legislated. It has simply declared that the Treasury note shall be a legal tender in payment of debts as a "dollar." As such, it is efficacious to satisfy all debts, according to the amount of the debts, estimated in dollars. But estimated *in which dollars?* Estimated in the *legal dollar of least value; for it is in that dollar that debts are always computed, since the debtor has the option to pay the debt in such dollars of least value.*

A man promises to deliver one hundred barrels of flour, and what is the amount of that debt? Why, the value of the flour in Treasury note dollars, now, one-third more than if computed in coin dollars.

And so the damages for the conversion of property, or the value of a bushel of corn, or of a month's wages, or the extent of an injury, and every other debt or decree payable generally in dollars, is computed now in the Treasury-note dollar, *i. e.*, in the lowest of the four legal-tender dollars in which debts can be paid and judgments discharged. Congress might have said the Treasury-note dollar shall not only be a legal tender in

payment of all debts, but also that it shall be received as equal in value to a dollar in specie; and then in every action, in computing the damages, we would have a right to ask what the value of the article sold or converted—or the amount of the service rendered—or injuries suffered—were, computed in specie dollars, and to limit the recovery to that sum.

Such, however, has not been the course of justice, which has distinguished, (because allowed to distinguish), between these unequal dollars; and, in giving judgment, has assessed damages in the dollar of least value in which the judgment could be discharged—assessed them in that dollar because the law has given the debtor the right to discharge the judgment in that dollar—assessed what it was just he should pay, *according to the measure by which he is allowed to pay it.*

And there was indeed no occasion for legislation, fixing the value of the Treasury-note dollar; but the contrary. Probably, not the ten-thousandth part of the debts due in the country, was due in any particular specified dollar, but only in "dollars" generally; and every possible advantage or credit which could be conferred on Government paper was given it, by enabling it to meet obligations payable in "dollars" generally, in which the great mass of the engagements of the country were expressed.

FOURTH POINT.—Congress, by its legislation and the Government, by its practice, have uniformly recognized the difference in value between the coin and paper dollar.

A. *The legislation of Congress.*

The Legal Tender Act itself discriminates, (§ 1.),

against the Treasury-note dollar for the payment of duties.

"Indeed, the provision that required duties to the Government to be paid in gold, *compelled* the citizen to acquire the gold to make the payment. If the right to receive the gold is established under the law, the right to purchase it for the purpose of paying it upon duties. must be established under the law."

So, by its subsequent legislation, Congress has repeatedly recognized, and provided for, the subsisting actual difference between the dollars.

The Act of March 17, 1862, authorized the purchase of coin with Treasury notes on the most advantageous terms. The Act of June 17, 1864, declared that thereafter loans of coin should not be made *unless made payable in coin*; thus assuming the legality of all coin loans. The Act of March 10, 1866, required all returns of income to state whether made in Legal Tender currency or coin; and if in coin, then the Assessor was to increase the assessment to the equivalent income in paper. And so the Act of March 10th, 1866, Chapter xv, § 4, assumed loans of coin to be valid; and the various Acts of 1861-2 authorized loans, some to be paid specially in coin, and others not.

B. *The Practice of the Government.*

The Government has, by its practice also, uniformly kept in view a distinction in value between coin and Treasury notes.

It has some loans payable specially in coin, and others payable in lawful money generally; it borrows coin to be repaid in coin, and Treasury notes to be repaid in Treasury notes. It daily issues bills, checks, and obligations, payable in "gold" and payable in "dollars" simply, *i.e.*, in curreney.

It keeps its accounts of specie and currency distinct, and reports each separately. It sells commodities for coin only, and buys and sells coin for currency. It estimates taxes on sales of gold according to the market value of the gold. In all returns of taxes and income it requires coin to be turned into the equivalent currency. It taxes all legacies of coin at their equivalent in currency, and receives only coin for duties.

And it is not a new thing for Government to recognize a distinction in the value of dollars. For ever since the coinage was debased in 1834, Government has forfeited goods for under valuation, where, as frequently happened, the invoice values were reckoned in the dollar of the earlier coinage, instead of in the dollar of the reduced coinage: and for some years advertised for, and purchased, at a premium, the dollars of the earlier coinage.

Some Judges have assumed that "the value of neither coin nor paper dollars is intrinsic, but derived from the omnipotent fiat of Congress in ordaining them to be a legal tender, by infusing, into these inanimate and almost valueless things, the vitality of a circulating medium, vesting them with a magic and almost incalculable value." 2 *Duval*, 74.

If the value comes only from the omnipotent stamp of Congress, that is an end of the case; for its stamp upon a scrap of paper would really make such paper the equal of a coined dollar. Such a Government may well be styled "omnipotent."

But inasmuch as this is not true, and there are "dollars" of different values in fact, and a recognition of such difference is not *forbidden by any statute*, this difference is to be regarded, unless repugnant to some great principle of public policy.

FIFTH POINT.—There is no reason or warrant for holding the different dollars of equal value in law; nor for refusing to recognize the actual existing difference in their values.

It has been claimed that the "law could not permit a discrimination between the coin and paper dollar without allowing its authority to be substantially annulled."

Well, if the greater and the lesser dollars are to be regarded as of the same value in law, what *must* follow?

A. lends B. 1,000*l.* sterling, worth to-day $7.000 in Treasury note dollars. By this doctrine, he can recover for his 1,000*l.*, only $4,844.

So held, 11 Allen, 369. 45 Barbour, 578.

A. dies, leaving among his effects 100,000 gold dollars. His administrator takes them, exchanges them for 200,000 Treasury note dollars, distributes to A's heirs, in Treasury notes, one half of this sum, and pockets the residue.

One of the cases now before the Court is, I believe, like this.

An army officer seizes 100,000 gold dollars as enemy's property, exchanges it for 200,000 Treasury note dollars, and accounts to his Government for only 100,000 of these dollars: and retains the residue for himself.

I deliver $10,000 in coin to a carrier. He may sell the coin for $14,000 of Treasury notes, tender me $10,000 of these notes, and so discharge himself and keep the balance.

So held in Ohio.

I deposit $10,000 in coin for safe keeping with my banker. I go for it next week, and, if he pleases, I must be content to take $10,000 of Treasury notes.

So held in Wisconsin.

My broker collects my Government coupons in gold, and, according to this doctrine, pays me the legal equivalent when he hands me over *the same nominal amount of currency dollars.*

You send your clerk with your gold to pay duties and he sells it, pockets the premium and returns you the like sum in Treasury notes, and you must rest satisfied.

And then, finally, as you must pay your duties in coin, you sell your goods at a reduced price for coin; and the buyer takes them and counts you out the reduced price in Treasury notes.

And so on, indefinitely, through all the transactions of life.

Of course, such monstrous injustice is appalling. It is so obviously against, instead of for, public interest and policy, that learned justices have sought to distinguish between the rule for torts and contracts.

This reluctance, however, to carry out to its logical results the notion that "the policy of the law requires the Courts to insist upon the fiction of the equality of dollars" only indicates the fallacy of the notion.

The argument is, that, as the Treasury note is only made a legal tender in payment of debts, it need not therefore be received in satisfaction for torts.

True, indeed; *for there is no legal tender for a tort.* No moneyed relief whatever in respect of it can be had until damages for the tort are computed. You can only compensate for torts by turning them into debts. If these notes are a legal tender in payment of debt, *then the debt* is met by payment in such notes, whether it arose in tort or contract. *The question is always how much should be paid in that article in which the payment may be made—made whether the claim was for an injury, a purchase, or a promise.*

If, to sustain the credit of the Government money, it be necessary that the paper dollar be treated as the equal of the coin dollar, then this is as necessary in estimating damages for a conversion as for a loan. If this necessity will not permit one to distinguish between these dollars when he loans coin, it cannot permit him to distinguish between them when he sells it.

It cannot be that when a man converts 1,000 barrels of flour the damages are to be estimated at the price of the flour in Treasury note dollars; while if he converts 1,000 coined dollars the damages are to be estimated at merely 1,000 paper dollars. That is, that for the flour, he must pay damages estimated at its *real* value: but for the coin, he need pay only to the extent of three-fourths of its value.

Either the law and public policy requires all dollars to be regarded as of equal value in law, and then the results indicated must follow; or contracts with reference to the actual difference in value are to be sustained.

SIXTH POINT.—But the true object and policy of the law is to recognize the actual differences which exist between the different dollars.

The debts of the country were, with scarcely an exception, at the time the Legal Tender Act was passed, payable in "dollars" simply, *i. e.*, in what the law might determine to be dollars. To make Treasury notes "dollars," and thus meet those debts, (and dues to the Government), was to give these notes every possible value, and create for them every possible demand, while violating no contract and establishing no forced valuation. Once issued, it was unavoidable that men should contract, deal and compute, with reference to the actual available value of these notes: and, to have attempted to prevent this, by

insisting that this Treasury note dollar should be deemed equal to the coin dollar, was to repeat a legislation which has always failed, and to have decreed a forced circulation and valuation which would have jeoparded the credit of the country and the chances of its new financial plan.

Congress did propose, in December, 1864, to enact the equality of the dollars, and to declare "that thereafter no difference in value should be allowed between them." The mere threat of such legislation produced an alarm which required the scheme to be abandoned.

Indeed, to ignore a distinction for which Government itself insists, and upon which all trade is based, not only cannot help Government credit, but injures it, by creating uncertainty and helping dishonesty. *Fides Reipublicæ Stabilitas.*

SEVENTH POINT.—These different dollars are not made of the same value by calling them by the same name.

The confusion about this question arises, I submit, from treating *different things as the same thing because they are called by the same name:* and from failing to bear in mind that, in estimating what should be paid in articles of different value but having the same name, the estimate should always be made in the variety *of least value, since in that the recovery may be discharged.*

It is not in the case of dollars alone that we have different measures of space or quantity, or value known by one name.

A month, formerly meant by law in New York four weeks; now it means, (by statute), thirty days. A bushel is, by statute, a certain weight in grain or corn, what-

ever its measure; and is so computed in law, unless "the parties have otherwise agreed" (1 Hill, 102). So, our ounces and pounds vary, in different trades; and the ton, which is 2,240 pounds in England, (and formerly here), is now by statute 2,000 pounds. But when a party contracts to deliver ounces, pounds, or tons, or bushels, or to pay in months, if he expresses in his contract *which ton* or bushel, ounce, pound or month, is intended, the agreement is always enforced *as expressed*; and, where the contract fails to express what was intended—as, for instance, where it calls for tons simply (by statute 2,000 pounds each), when what was intended was tons of 2,240 pounds,—the parties may have the contract reformed so as to express the true intent. (9 Paige Ch. 195.)

The fallacy of confounding the distinctions between dollars consists in assuming that because they are equally good for a certain and most important purpose, (that of meeting contracts payable in dollars generally), they are therefore the equivalent of each other. A debt is the amount due in "dollars" merely; the Treasury note meets the debt *because it is a dollar, not because it is the equal of a coin dollar;* because it is one of the class that the contract calls for, *and thus comes up to the contract*, not because it is the equal of the best of its class. On a debt of one hundred gold dollars, and hundred lawful dollars, the same amount is not now due; the same number of dollars is due, but not of the same kind. Just as a dozen large eggs and a dozen small ones are equally good to meet an agreement to deliver eggs simply. Both are eggs, but not therefore in all respects of equal value, for only the one will satisfy a contract for large eggs.

EIGHTH POINT.—But even if the different dollars were of the same intrinsic value, parties should be

left at liberty to discriminate between them.

Why should not parties be at liberty to discriminate and contract with reference to a difference between the coined and paper dollar, even if they were of the same *intrinsic* value?

We frequently hear of sales of Washington cents, and of dollars of certain years' coinage, at very high prices.

It was never suggested, before the Legal Tender Act, that such sales were not legal, and that if a man agreed to pay fifty dollars for one dollar of the coinage of the year 1808 he should not pay it.

So, at times when gold is being shipped abroad, double eagles will command a premium over smaller gold coins, because of the greater facility with which they may be counted, handled and packed. But it has never been suggested that an agreement to pay a premium for double eagles, although the payment was in coins of intrinsically the same value, could not be enforced, for the reason that "the law cannot permit a discrimination between the "different dollars, without allowing its authority to be "annulled."

NINTH POINT.—The true meaning of an obligation to pay "one thousand dollars in gold" is, that that the debtor will pay *one thousand gold dollars;* not so much gold as equals one thousand lawful i.e. Treasury-note dollars.

It is conceded that (in New York and some of the other States), the limit of recovery upon notes payable for a fixed sum in commodities is the sum named. That is, upon a note to pay "one thousand dollars in flour at ten dollars a barrel," the debtor has the option of deliver-

ing the one hundred barrels of the flour, or of paying the money; and no more than one thousand dollars can be recovered thereon.

But, in such cases, there can be no question as to what is meant by the contracts. They are contracts payable in a commodity *wholly distinct, and which has a different name, from the money* to be paid; and the cases fix only the measure of recovery on such contracts. All they establish is, that if the contract means "I will pay so much coin as equals one thousand dollars," then one thousand dollars is all that can be recovered upon it; which no one will dispute.

Now, to claim that when a man binds himself to pay "one thousand dollars in gold or silver coin," the parties mean so much gold or silver coin as amounted in value to one thousand lawful (Treasury-note) dollars, seems to me preposterous. Neither the nature of the transaction, the course of business, nor the words themselves, justify that construction.

I have before me a Government certificate in these words: "It is certified that 100 dollars have deposited with the Assistant Treasurer of the U. S. in New York, *payable in gold*, to the bearer."

Does that mean that the Treasurer will pay so much gold as equals one hundred lawful (i. e., Treasury-note dollars; or does it mean that he is to pay *one hundred coined* dollars? Is it properly to be met by paying *seventy-two* coined dollars, the rate of the day, or, does it call for *one hundred* coined dollars?

Or, when a dealer writes to the Director of the Mint: "Send me one thousand dollars in double cents," does he not mean 50,000 double cents instead of 70,000; the latter being the real equivalent in value of one thousand Treasury-note dollars? *

Or, when a man promised to pay one hundred dollars

* A double cent is intrinsically worth only about as much as *one* copper cent of the earlier coinages, *i. e.*, about seventy double cents can be purchased for one Treasury note dollar.

in Confederate currency, did he mean a wagon load of paper, equal in value to one hundred Treasury note dollars; or did he mean he would pay one hundred of the Confederate dollars?

To state these questions, I submit, is to argue them.

The Supreme Court of Connecticut held that a note to "pay $88 in bank bills current in Norfolk" was a contract to deliver that nominal sum in such bills, and that only their value was due on it (3 Conn. 273). So the Supreme Court of Illinois held (12 Ill., 190, 14 Ill. 105): of Iowa, (16 Iowa, 324): of Tennessee (7 Humphrey, 33): of Arkansas (4 Ark., 175): of Texas (1 Texas 373): of Pennsylvania (10 S. & R., 93): of the United States (8 Peters, 198).

When the contract is for an amount of dollars *in a comodity*, the number of dollars is the measure of recovery if the debtor fails to deliver the commodity. *When it is for a partiular sort of dollar*, the measure of recovery is for the value of *that dollar*.*—(Robinson *vs.* Noble, 8 Peters, U. S., 198).

TENTH POINT.—The weight of authority is *now* in favor of the recognition by the Courts of the existing distinction in value between the different dollars.

New York: 49 Barb., 394, 508; 45 Barb., 511; 50 Barb., 520; 35 How., Pr. Rep. 9.

* Where the "Currency," at the time of making the obligation, is of equal value with lawful money, the contract is properly construed to mean lawful money: but when it is depreciated below the value of lawful money, the rule of the text applies. This has more generally been the case in the West and South: and most of the cases are therefore found there. Conversely, if there be two lawful dollars of unequal value, the measure of recovery on a contract specifically for the dollar of superior value, must be its value in the dollar of least value in which the debtor can discharge the recovery.

Pennsylvania: 54 Penn., **73**; 52 Penn., 109.
Illinois: 34 Ill., Rep. 355.
Massachusetts: 14 Allen, *Seers* v. *Dewing*; *Cushing* v. *Wells*, *Bowditch* v. *Soltyk*, 3 Am. Law Review, 168-9.
California: 28 Cal., 410, and numerous later cases.
Indiana: 27 Ind., 426.
Kentucky: 2 Duval, 103, 2 W. P. D. Bush, 534.
U. S. Circuit Court, Penn., Grier, J.

Ground Rent Cases.

U. S. Circuit Court, New York: Nelson & Hall, J J.. 5 Am. Law Reg., *N. S.* 45-49.
U. S. Dist. Court, Maine: 26 Law Rep., 564.
Supreme Court, Dist. Columbia: Thompson v. *Riggs*, MSS.
Nova Scotia: Supreme Court, 4 Am. Law Reg., *N. S.* 376.

And *this* Court seems to have so considered years ago.

For when, in 1842, the State of Arkansas took bonds payable, some in "dollars" simply, and others for so many "dollars in specie or its equivalent," at a time when the notes of the State Bank were a legal tender for all debts due the State, the Supreme Court of the United States held, that while these notes were a lawful tender in satisfaction of a judgment recovered by the State, the State was not bound to receive them for the bonds payable "in specie." (Woodruff *v.* Trapnall, and Paup *v.* Drew, 10 Howard, U. S., 190, 223-4.)

And Thompson *v.* Riggs, 5 Wallace, 178, would seem to be to the same effect.

ELEVENTH POINT.—Congress has no power to restrain private citizens from contracting with refer-

ence to the dollars it puts forth; nor to prohibit the State Courts from giving effect to contracts in respect of such difference.

A determination by this Court, that contracts made with reference to the actual difference between the coin and Treasury note dollar cannot be enforced, must lead to the greatest private injustice—to embarrassment in every department of trade—to the prevention of foreign loans and credits—and to the depreciation of government securities. For upon what possible principle can government be expected to pay coin after it has been established that the law and public policy forbids any discrimination between coin and paper? With what propriety can Government insist that the Tax payer shall return his income in coin, as worth one third more than if received in Treasury notes, when its law and policy forbid recognizing the difference between the two currencies.

But a decision by this Supreme Tribunal that men may contract with reference to the existing difference between the currencies, will relieve trade from needless embarrassments and risk, and open the way to sound dealings; and by establishing justice, will strengthen the credit and prosperity of the whole nation.

CLARKSON N. POTTER,

of Counsel.